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JUDICIAL ETHICS OPINION JE-32

Formal

Question #1: When an assistant county attorney becomes a district judge, must he disqualify himself in all criminal cases which arose while he was serving in the county attorney's office, or only in those cases in which he was actively involved?

Answer: He should disqualify himself only in those cases in which he was actively involved.

Question #2: May the defendant waive any such disqualification?

Answer: No, except in single-judge circuits and districts.

Question #3: May a judge give his accounts receivable to another attorney for collection?

Answer: Yes.

Question #4: May a judge receive a fee for work which he started before becoming a judge when that work is completed by another lawyer?

Answer: Yes.

References: SCR 4.300, Canon 3C(1)(b); Canon 3D; Canon 5F. Judicial Ethics Opinion JE-5 and JE-8; American Bar Association Informal Opinion 1215; American Bar Association Commentary to the Code of Judicial Conduct.

OPINION:

Question #1:

Canon 3C(1) provides in part:

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

...

(b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter....

In Thode, Reporter's Notes to Code of Judicial Conduct (ABA 1973) we find the following commentary following this Canon:

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

Although this commentary probably contemplates agencies which engage in civil litigation rather than criminal cases, we think that the same reasoning applies. As we pointed out in our Judicial Ethics Opinion JE-8, the prosecutor's office is not a law firm and is not "substantially affected" by the outcome of the proceeding. The county attorney does not represent clients nor does he have a financial interest in the outcome of the litigation.

For these reasons we hold that a judge need not disqualify himself in all cases coming out of the county attorney's office in which he was associated.

However, he must step aside in those cases in which he was directly involved. Not only does Canon 3C(1)(b) expressly mandate this, but the appearance of impropriety would be great if he did not disqualify in those cases.

Question #2:

Although the provisions of Canon 3D on remittal of disqualification are by their terms limited to cases where the judge has a financial interest and those where a close relative of the judge is acting as a lawyer in the case, we recognized in our opinion JE-8 that mandatory disqualification could cause hardship in single-judge circuits and districts, and held that the disqualification could be waived in such circumstances. If the defendant would rather waive the disqualification than wait for the appointment of another judge, we think he should be allowed to do so. Any such waiver must meet the requirements of SCR 4.300, Canon 3D.

We suggest that the judge-elect resign as assistant county attorney forthwith in order to minimize the problems of disqualification.

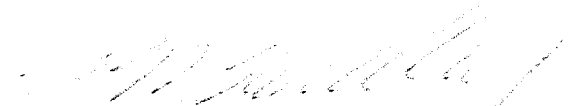
Question #3:

Judges are clearly entitled to reimbursement for work done before ascending the bench, but in pursuing their remedies they must be careful not to engage in the practice of law, which is forbidden by Canon 5F. This Committee has held, in its opinion JE-5, that a lawyer who does tax work is practicing law even though membership in the bar is not a prerequisite to such work. Similarly, a lawyer who seeks to recover accounts receivable is surely engaged in the practice of law, even though the accounts receivable are his own. Therefore this Committee takes the position that the judge must turn his accounts over to another lawyer for collection.

Question #4:

Similarly, it is clear that a judge may receive compensation for matters which he began before ascending the bench and which were then turned over to

another attorney for completion. As indicated in American Bar Association Informal Opinion 1215, the rules of professional ethics would govern the amount of such compensation and the method of payment. The division of fees should be reasonable and in proportion to the services performed. Full disclosure should be made to the client.



B. M. Westberry, Chairman
Ethics Committee of the Kentucky Judiciary